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In the Supreme Court of the United States

OCTOBER TERM, 1960.

VICTOR CARLUCCI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority (Pet. App. 29–40) and dissenting opinions (Pet. App. 41–47) in the court of appeals are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1961 (Pet. App. 48). By order of March 15, 1961, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 1, 1961. The petition was filed on April 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying a motion for a mistrial, where the jurors merely glanced at newspaper headlines regarding the case but did not read the news articles themselves.

2. Whether the evidence was sufficient to support petitioners' convictions.

STATEMENT

An indictment returned in the United States District Court for the Western District of Pennsylvania charged petitioners Carlucci and Hanna in Count 1 with the interstate transportation of guns stolen from a United States armory, in violation of 18 U.S.C. 2314 and 18 U.S.C. 2 (the aider and abettor statute); in Count 2 with the transportation of these guns with reasonable cause to believe they had been stolen, in violation of 15 U.S.C. 902(g) and 18 U.S.C. 2; in Count 3 with their receipt and concealment in violation of 18 U.S.C. 641 and 18 U.S.C. 2; in Count 4 with their possession without the required transfer tax having been paid, in violation of 26 U.S.C. 5851; in Count 5 with their transportation without the required registration and stamp-affixed order and declaration, in violation of 26 U.S.C. 5855 and 18 U.S.C. 2;[1] and in Count 6 with exporting these guns to Cuba without the required registration, in violation of 22 U.S.C. 1934 (App. 12a-16a). Count 7 charged all the petitioners with conspiracy to commit the above offenses and named a Dr. Pessolano as a co-conspirator (App.

[1] Petitioner Giordano was also charged as a defendant in Count 5 (App. 15a).

16a–20a). An indictment in the Northern District of West Virginia naming petitioner Sutor in similar substantive counts was consolidated for trial with the Pennsylvania indictment (App. 21a–24a, 9a).

The jury found all petitioners guilty as charged (App. 5a, 10a). Carlucci and Hanna were sentenced to imprisonment for five years and a $10,000 fine on the conspiracy count with concurrent sentences on the substantive counts (App. 163a–166a); Rothman and Merola to five years and a $10,000 fine on the conspiracy count (App. 156a–157a, 167a–168a); Giordano to three years on the conspiracy count, with a concurrent sentence of three years on count 5 (App. 169a–170a); and Sutor to five years and a $10,000 fine on the conspiracy count, with concurrent five year sentences on the substantive counts (App. 158a–162a). On appeal (App. 7a), the convictions were affirmed by the court of appeals *en banc*, three judges dissenting (Pet. App. 48).

1. Evidence adduced at the trial may be summarized as follows:

During the early morning hours of October 14, 1958, weapons owned by the United States were stolen from the National Guard Armory at Canton, Ohio (App. 33b–38b).

On October 16, petitioner Rothman asked Dr. Pessolano in Miami to get an airplane and pilot for a "hunting and fishing trip up north" (App. 25a–26a), and subsequently delivered $6,000 in cash for that purpose (App. 28–29a). There were a number of telephone calls on the subject between Dr. Pessolano

and Rothman who, during one of the calls, was in Cuba (App. 33a).

On October 24, a Twin Beech airplane rented by Dr. Pessolano was flown by petitioner Sutor with Merola as a passenger to Allegheny Airport (App. 68b–70b; App. 48a; see also App. 34a–36a). Sutor told several people he was taking the plane north for sale (App. 53b–55b, 86b–87b).

On the morning of October 25, when Sutor had the plane refueled at the Allegheny County Airport, there was no cargo on the plane (App. 80b, 86b–87b). The plane, with pilot and passenger, landed at Remich Airport,[2] 19 miles from Allegheny County Airport, at about 1 p.m. on October 26 (App. 86b, 107b–108b, 23b, 60a). Merola, Carlucci, Hanna, and the pilot Sutor were all seen at Remich Airport (App. 61a, 64a, 65a, 69a–70a, 98b, 104b). Carlucci gave the pilot directions as to where to park the plane and entered the aircraft (App. 50a–53a). Also seen at Remich Airport were an "S. & S. Distributor" panel truck and an Oldsmobile in which Carlucci was either the driver or a passenger (App. 62a, 101b). The panel truck was a few feet from the plane, the doors of both the truck and the plane were open, and there was "activity" near the plane (App. 95b–96b, 62a–63a).

Sutor took off for Morgantown, West Virginia, but was forced to land at Washington County Airport because of bad weather. The airport manager testified

[2] Remich Airport is a small field with limited runways. An experienced pilot testified that many times he had refused to fly a Twin Beech plane out of there, although it could be done (App. 174b–175b).

that Sutor had to crawl over the cargo covered by brown material in getting in and out of the plane (App. 114b–115b). Sutor did not take off again until October 28 and after a stop in Savannah, Georgia, he landed in Miami on October 29 (App. 123b, 129b–131b, 44b, 52b).

On November 2, 1958, when Sutor was preparing to take off again in the same rented plane from Miami, he told Dr. Pessolano that he thought the cargo on his previous flight had been "guns" (App. 37a). Sutor landed at Allegheny County Airport on the evening of November 3 (App. 135b–136b, 143b). From his hotel Sutor called Carlucci's number in New Kensington, Pennsylvania, and Dr. Pessolano's in Miami (App. 144b–145b, 198b). On November 4 at about 8:45 a.m., Sutor entered the empty plane with a Mae West life jacket used for buoyancy in water (App. 48b, 145b–146b), and flew to Remich Airport (App. 148b–149b). Shortly after the plane's arrival a phone call was made from Remich Airport to Carlucci's phone number at New Kensington (App. 228b–230b). Thereafter Carlucci's Oldsmobile and the "S. & S. Distributing" truck were seen at the airport (App. 89a, 154b–156b, 166b–167b, 191b). The doors of the plane and the truck were again open, and men were seen unloading heavy bundles from the truck into the plane (App. 88a–89a, 153b, 164b, 166b, 167b). Hanna was identified as the driver of the truck (App. 76a–77a, 83a–84a). As the plane took off from Remich Airport it appeared to be very heavily loaded (App. 157b).

Upon landing at Morgantown, West Virginia, Sutor again crawled out over the cargo and told the airport manager that the load was "approximately 1200 pounds" (App. 30b, 31b). Sutor was arrested by a West Virginia policeman and detained on order of Border Patrol agents (App. 8b). The cargo was wrapped in burlap bags and consisted of rifles, carbines, and machine guns in operable condition, about half of the guns previously stolen from the Canton armory (App. 25b–29b). It was stipulated that none of the petitioners had paid a tax on the transfer of these weapons, registered them, or registered as being engaged in the business of exporting arms (App. 240b–242b).

As to the burlap bags in which the guns were wrapped, in the latter part of October 1958, before the first plane flight, Giordano, who had known Carlucci and Hanna for 15 years (App. 97a, 98a), gave $20 to Palumbo, an employee of Carlucci, to purchase 100 burlap bags. Palumbo purchased 100 used bags turned inside out from the Arnold Cash Feed Store and placed them in Giordano's car (App. 92a, 95a, 168b–170b, 245b–247b). The bags in which the guns were wrapped were turned inside out and had some residue of grain in them (App. 170b–171b). A microscopic examination of the debris from these bags, the panel truck, and the plane, showed that the debris contained the same type of grain as that found in the Arnold feed store (App. 183b–184b, 187b).

Giordano was the only petitioner to take the stand. He admitted paying Palumbo to buy the bags. He said that after bringing them home he put them in his

cellar and used them on his lawn (App. 99a, 100a). He denied seeing Carlucci that day. When an F.B.I. agent interviewed him some time later (R. 252b), he showed the agent the bags (R. 102a). The F.B.I. agent testified that when he interviewed Giordano on November 14, 1958, Giordano said that, while discussing a new beverage with Carlucci, he asked Palumbo to buy the bags for him; that three days later he remembered that the bags were in the trunk of his car which his daughter had driven to college and therefore he made other purchases of bags (R. 254b–256b). The bags the agents saw in Giordano's cellar were clean and turned right side out (App. 256b–258b).

There was evidence as to close association among the conspirators prior to November 4, 1958. Dr. Pessolano had known Rothman, Merola, Carlucci, Hanna, and Giordano for periods of 10 to 40 years (App. 25a), and also knew Sutor (App. 36a). Giordano had known Carlucci and Hanna for about 15 years (App. 97a–98a). Rothman and Merola knew each other (App. 213b–214b), and Merola knew Carlucci (96a). Merola, Carlucci, Hanna, and Sutor were all at Remich Airport on October 26, 1958 (App. 61a, 64a, 65a, 69a–70a, 98b, 104b). There was also evidence of many telephone calls being made between listed numbers of the petitioners (App. 227b, 229b–230b, 233b–240b).

2. As the trial progressed the jurors were repeatedly admonished not to read newspaper accounts of the trial (App. 272b–278b). During the trial, it came to the court's attention that local newspaper

articles had reported that the petitioners were connected with a gambling combine in New Kensington, that some of them were connected with gambling interests in Cuba before Castro took over, and that they were engaged in a gun running plot (App. 181a–185a). The court asked whether any jurors had read any newspaper accounts of the trial. One juror stated that he had, and the court began to take the names of others who had raised their hands to indicate that they also had read such accounts (App. 107a–108a). A juror then stated (App. 108a): "I would like to qualify my answer, that in reading the newspaper I have noticed the headlines, just noticed them and then just simply paid no further attention, other than those things you just scan quickly as you look at it. I didn't look at it to remember it." The other jurors who had previously indicated that they had read the articles then stated that they, too, had merely glanced at the headlines while reading other news; one alternate juror, however, stated that she had read a "small * * * article" about the case which contained her name (App. 108a–110a). The court then asked if anyone had read anything other than the headlines, and there was no response (App. 111a). Shortly thereafter, the court stated to the jurors as follows (App. 112a–113a):

> Now I am going to ask this question of all of you: From your glances or perusal of any of the headlines or of any other matter contained in any newspaper or anything you might have heard on a television broadcast or radio broadcast, is there anyone here who has any doubt in

his mind or her mind but that he or she could try this case and base his or her verdict entirely upon the evidence brought into court and admitted here and uninfluenced by any outside communication of any kind whatsoever? Now don't be afraid to say so.

If you have any qualms about it, if there is anything that you have heard outside the courtroom concerning any person connected with this trial which you have reason to believe would make it difficult for you to give any of the defendants in this case a fair trial, please don't hesitate to say so.

(No response.)

THE COURT. I am satisfied.

I think we will proceed with the trial.

So now be sure to keep this admonition that I have given you in mind.

The court then overruled motions for a mistrial based upon the jury's alleged reading of the newspaper articles (App. 113a–117a).

ARGUMENT

1. Petitioners, quoting the dissenting opinion below, argue (Pet. 9–14) that under *Marshall* v. *United States*, 360 U.S. 310, it was an abuse of discretion for the trial judge to deny their motion for a mistrial after the jurors admitted reading headlines of newspaper stories about the trial. In *Marshall*, however, the Court specifically pointed out (p. 312) that in this area "each case must turn on its special facts." The "special facts" of this case are different from those in *Marshall* and the trial judge here did not abuse his

"large discretion" (*Marshall, supra,* p. 312), in denying a mistrial.

In *Marshall,* a number of the jurors admittedly had read newspaper articles containing highly prejudicial information which the trial court had held inadmissible as evidence. This Court held that in such circumstances the trial judge could not accept the jurors' own subjective judgments that they would not be influenced by such stories.

In this case, on the other hand, the jurors stated that they had read only the headlines, not the stories themselves. While the jurors initially had indicated that they had read the stories, one of the jurors promptly explained that he had actually merely noticed the headlines. All the other jurors who had previously raised their hands to indicate that they, too, had read the articles, then stated, in response to questioning by the judge, that they had only glanced at the headlines. After receiving this information from the jurors, the judge told the jurors not to be "afraid" or to "hesitate" to state whether anything they had read or heard about the case would preclude them from basing their verdict solely upon the evidence. There is nothing in the *Marshall* decision that precluded the trial judge from accepting the jurors' statements that they had read only the headlines, not the articles. In view of the trial judge's interrogation of the jurors after they explained what they had read, he was not required to probe the initial raising of hands to his question whether the jury had read newspaper articles relating to the case.

Even though jurors are admonished by the court not to read newspaper accounts of the trial in which they are sitting, they naturally assume (as they did here) that they may read newspapers on other subjects. In the process of doing this it is almost inevitable that they will read, even though inadvertently, the headlines relating to their case. The principle applied in *Marshall* does not automatically require a new trial in every such instance.

2. Contrary to petitioners contention (Pet. 15–28), the evidence was sufficient to sustain the convictions. Much of the evidence as to the conspiracy was circumstantial, but participation in a criminal conspiracy need not be proved by direct evidence but may be inferred from a "development and a collocation of circumstances." *Glasser* v. *United States*, 315 U.S. 60, 80. Although this Court does not ordinarily review the sufficiency of the evidence where both courts below have found it sufficient,[2] we summarize in abbreviated form the evidence against each petitioner.

GIORDANO

The sufficiency of the evidence to establish Giordano's guilt under the conspiracy count[3] is, as shown by the four-to-three division on this issue in the court below, a close question. We submit, however, that the majority below correctly held the evidence suf-

[2] See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589–590. The dissent in the court below on the sufficiency of the evidence involved only Giordano.

[3] Since Giordano's sentence under count 5 was concurrent with that under the conspiracy count, we do not discuss the evidence under the former count.

ficient to go to the jury. Giordano had long been associated with Carlucci, Hanna and Dr. Pessolano. He purchased the burlap bags which were used to wrap the guns. He initially admitted to an F.B.I. agent that he had had a conversation with Carlucci when he sent the latter's employee, Palumbo, to buy the bags; at the trial, however, he denied having any such conversation. Giordano admitted transporting the bags in his car to his home, and gave a false explanation of the use to which the bags had been put. The bags did not carry themselves from Giordano's car to the guns. The jury could properly infer, from all the circumstances, that Giordano had knowingly performed a specific task in effectuating the conspiracy, namely, procuring the bags used to wrap the guns.

This case is not analogous to *United States* v. *Falcone*, 311 U.S. 205, as Giordano contends. *Falcone* involved the issue whether a mere supplier could be an aider and abettor of the substantive crime. Giordano was not a commercial seller of burlap bags, but a casual purchaser of a large number of bags subsequently used in carrying out a criminal conspiracy.

HANNA

Hanna's guilt under the conspiracy and substantive counts was shown by his previous association of long standing with Dr. Pessolano and Giordano, his presence at the Remich Airport on October 26, 1958 (the date of the first gun shipment by airplane) when the panel truck, Carlucci, Merola, and Sutor were also seen there; and his appearance at Remich Airport on

November 4, 1958, as the driver of the truck carrying the stolen guns, a few minutes after the telephone call to Carlucci's home.

CARLUCCI

Carlucci's guilt under the conspiracy and substantive counts was shown by his prior association with Dr. Pessolano, Giordano, and Merola; his conversation with Giordano when Giordano sent Carlucci's employee, Palumbo, to purchase the bags; his presence at Remich Airport, together with Hanna, Merola, and Sutor, his directing the plane where to park, and his climbing into the aircraft with Sutor, on October 26, 1958; and the telephone call to his New Kensington number on November 4, 1958, after which Hanna drove to the airfield with the truckload of guns and Carlucci's Oldsmobile also appeared.

SUTOR

Sutor's guilt under both the conspiracy and substantive counts was shown by his contacts with Merola and Pessolano prior to the first flight north from Miami; his appearance at Remich Airport on October 26, 1958, along with Merola, Hanna, and Carlucci, when the plane was loaded from the panel truck; his own statement that he thought guns were the cargo on this flight; and his flight on November 4, 1958, when he was apprehended with the cargo of stolen guns without a bill of lading.

ROTHMAN

Rothman's participation in the conspiracy was shown by his original request a few days after the

burglary of the Canton armory that Dr. Pessolano arrange for an airplane to make a trip north; his delivery of $6,000 in cash to Dr. Pessolano for an airplane; his telephone calls, some of which were from Cuba; and his association with Merola, who made the trip north with the pilot Sutor.

MEROLA

Merola's guilt under the conspiracy count was shown by his prior association with Rothman; his unannounced appearance at Dr. Pessolano's office prior to the flight north with the pilot Sutor; and his appearance at Remich Airport on October 26, 1958, the date of the first gun shipment, together with Carlucci, Hanna, and Sutor.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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